UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VELMA M. SCOTT, Appellant, v. U.S. POSTAL SERVICE, Agency.	DOCKET NUMBER CH0353910676-I-1 DATE: OCT 2 2 1993

Gerald A. Goldman, Esquire, Goldman & Marcus, Chicago, Illinois, for the appellant.

Valerie E. Parker, Bedford Park, Illinois, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

Chairman Erdreich issues a dissenting opinion.

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued September 4, 1991, that dismissed her appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R § 1201.117, however, AFFIRM the initial decision as MODIFIED

by this Opinion and Order, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

Starting in 1982, the appellant has had several extended absences from the workplace because of a work-related knee condition. In March 1990, she left her duties as a Supervisor of Mails, EAS-15, at the Joliet, Illinois Post Office, to undergo knee surgery, and was released for limited duty in January 1991, with the restriction that she not be on her feet for more than two hours a day. *See* Agency File (AF), Tabs 4V-4W. On January 15, 1991, the agency offered the appellant a limited duty position[1] which the appellant accepted. AF, Tab 4T. After performing these duties for about two weeks, the appellant complained of pain and swelling and was again placed off duty. On July 19, 1991, the agency offered the appellant the same limited duties it had offered in January, except that the offer specified that the total time to be spent walking and standing was limited to two hours. AF, Tab 4B. The appellant refused this offer on the basis that the agency had re-offered the same position that had already been found to be unsuitable to her physical limitations. *Id.*

In her appeal to the Board's regional office, the appellant claimed that the agency had failed to restore her to duty following her partial recovery from a compensable

[1] Although the offer itself does not list a job title or location, the appellant stated that the job offered was the Supervisor of Mails position she occupied prior to her knee surgery. Initial Appeal File (IAF), Tab 6.

injury.[2] The agency moved to dismiss the appeal as outside the Board's jurisdiction under 5 C.F.R. § 353.401(c), which limits the appeal rights of a partially recovered individual to a determination of whether the agency acted arbitrarily and capriciously in denying restoration. Contending that it had actively sought to provide a position within the appellant's restrictions, the agency cited the January and July 1991 offers described above, and said that it also offered a position in Marketing and Communications on August 12, 1991, after the filing of the Board appeal. *See* AF, Tab 4. In response to the agency's motion and the administrative judge's order to show cause why her appeal should not be dismissed for lack of jurisdiction, the appellant contended that the July offer was so unreasonable as to be an effective denial of restoration. She also submitted an affidavit denying that she had been offered a position in Marketing and Communications. IAF, Tab 6. She asserted, moreover, that the agency had failed or refused to offer her several other positions that were within her medical limitations. *Id.*

The administrative judge found that the agency had offered the appellant a variety of positions at different

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[2] The appellant also claimed that she had been discriminated against because of sex and handicap. The administrative judge found that the Board lacked jurisdiction over these allegations because 120 days had not yet passed from the filing of the appellant's EEO complaint. *See* 5 C.F.R. § 1201.154(b)(2); *Lightfoot v. Department of the Navy*, 29 M.S.P.R. 265, 266 (1985).

locations.[3] Regarding the July 1991 offer, he found that, because the agency had modified its offer to satisfy the appellant's complaint that the position required her to be on her feet more than two hours a day, she had not shown that this offer constituted an effective denial of restoration. The administrative judge concluded that the appellant had failed to raise nonfrivolous issues of fact relating to the Board's jurisdiction, and that dismissal without a hearing was therefore appropriate.

ANALYSIS

An injured employee who partially recovers from a compensable injury may appeal to the Board only for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. She has no right to appeal an alleged improper restoration. *See* 5 C.F.R. § 353.401(c); *Gucciardo v. U.S. Postal Service*, 48 M.S.P.R. 420, 423 (1991). The Board has stated, however, that it "might, in appropriate circumstances, find a partial restoration to be so unreasonable as to be an effective denial of restoration and, thus, within the Board's jurisdiction." *Phillips v. U.S. Postal Service*, 9 M.S.P.R. 108, 110 n.1 (1981); *see also Myrick v. U.S. Postal Service*, 21 M.S.P.R.

[3] We find no basis for this finding. The appeal file reflects only three offers following the appellant's partial recovery from knee surgery: the January and July offers, which entailed the same position at the same location; and the alleged August 12 offer in Marketing and Communications. *See* AF, Tabs 4, 4B & 4T. Regarding the alleged August 12 offer, the agency did not rebut the appellant's sworn statement that no such offer had been extended.

79, 81 n.2 (1984); *Blackburn v. U.S. Postal Service*, 12 M.S.P.R. 630, 631 n.1 (1982).[4]

There appears to be no dispute that the limited duty position offered to the appellant on January 15, 1991, was not within her medical limitations because it required her to be on her feet more than two hours a day. *See* AF, Tab 4M (Report of Rehabilitation Counselor). The appellant contends that the agency's July 19 offer was unreasonable, and an effective denial of restoration, because the agency simply re-offered her the same unsuitable position, without modifying its duties to conform to her medical limitations. She points out that the two-hour standing and walking limitation applied to the position she briefly accepted in January, even though this limitation was not expressly stated in the offer, and that the only difference in the description of job duties in the two offers is the inclusion in the later offer of the two-hour limitation. *Compare* AF, Tab 4T *with* AF, Tab 4B.

The appellant's contention that the agency did not intend to modify the duties of the Supervisor of Mails position so that it would meet her medical limitations is supported by little more than her presumption that this was the case. The

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[4] We further note that in *Barry v. Department of the Army*, 44 M.S.P.R. 432 (1990), the Board found no error in an administrative judge's determination that the agency satisfied its duty to a partially recovered employee when it offered him a position which he declined. The Board agreed with the administrative judge that the offer was a "valid" one, because the position was permanent and because the appellant was qualified, both physically and otherwise, to perform its duties. *See id.* at 435-36.

mere fact that the offer involved the same position which the appellant tried unsuccessfully a few months earlier is insufficient to establish that the position could not and would not be modified to conform to the appellant's medical limitations. The agency stated affirmatively that the position would be subject to the condition that she be on her feet no more than two hours per day. We will not assume, and the appellant was not entitled to assume, that this statement was meaningless or made in bad faith. If she was concerned as to whether or how the agency proposed to modify the duties of the position to conform to her medical limitations, it was incumbent on her to ask how this was to be done. There is no evidence that she did so. Instead, she simply declined the offer.

We note that the Rehabilitation Counselor, in a report dated July 22, 1991, stated that "the job being offered [is] the one she previously accepted and tried," which "proved to be non-feasible given this individual's current limitations." AF, Tab 4A. He recommended that the agency consider other employment alternatives, because "it appears to me that since the previous job offer was found to be non-suitable and restrictions have not changed, it would still be considered as non-suitable." *Id.* The Rehabilitation Counselor's conclusion is entitled to little weight, however, because he appears to have relied only on the appellant's contention that the July offer was non-suitable, rather than on another independent analysis of the job. *See id.*

Under the evidence of record, we find that the appellant failed to make a nonfrivolous claim that the agency's July 19 offer was "so unreasonable as to be an effective denial of restoration and, thus, within the Board's jurisdiction." *See Phillips*, 9 M.S.P.R. at 110 n.1; *Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984) (an appellant who raises nonfrivolous issues of fact relating to jurisdiction that cannot be resolved on the documentary evidence submitted is entitled to a hearing on the jurisdictional issue). Accordingly, her appeal presented, at most, a claim of improper restoration, which is not within the Board's jurisdiction. *See Gucciardo*, 48 M.S.P.R. at 423.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF CHAIRMAN ERDREICH

in

Scott v. U.S. Postal Service
MSPB Docket No. CH0353910676-I-1

To be entitled to a jurisdictional hearing, all an appellant is required to do is to allege facts which, if proven, could make a prima facie case of jurisdiction. *See Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 893-94 (Fed. Cir. 1986). While summary dismissal for lack of jurisdiction is appropriate based on the documentary record when there are no contested issues of fact, such action is inappropriate when the appellant has raised legally sufficient factual issues that require resolution. *See id.* at 894-95. When an appellant's submissions satisfy this criterion, the Board must grant the appellant a jurisdictional hearing; it may not weigh the evidence, resolve conflicting assertions, or dismiss an appeal on the ground that the appellant has not proved facts establishing jurisdiction by a preponderance of the evidence. *See id.* at 893-95.

The appellant presented evidence that, although the position she accepted in January 1991 was subject to the two-hour standing and walking limitation, this limitation was not expressly stated in the offer, and that the only difference in the description of job duties in the two offers is the inclusion in the July 19 offer of the two-hour limitation. The record also reflected the view of the Rehabilitation Counselor that the position offered in July was not within the

appellant's medical limitations because it involved the same duties which the appellant had tried unsuccessfully to perform in January. In my view, this evidence was sufficient to establish a prima facie case supporting the appellant's claim that the agency merely re-offered her the same position she had performed in January 1992, without modifying the duties of the position to conform to her medical limitations. If true, this allegation would be sufficient to establish jurisdiction under the Board's precedents in *Phillips*, *Myrick*, and *Blackburn*, cited by the majority.

This is not to say that the present record establishes that the agency has not actually modified the duties of the position to conform to the appellant's medical limitations. By the same token, the present evidence does not justify a contrary conclusion. Similarly, it may be true, as the majority infers from the documentary record, that the Rehabilitation Counselor relied solely on the appellant's contention that the July offer was non-suitable, rather than on another independent analysis of the job. It may also be true, however, that the Rehabilitation Counselor did not rely solely on the appellant's representations, but made some independent inquiry.

I believe the majority has gone beyond considering whether there are genuine issues of fact to be resolved, and has instead weighed the evidence and made speculative inferences from the documentary record. In my view, the appellant "raised legally sufficient factual issues that

required resolution," and is therefore entitled to a jurisdictional hearing. *See Dumas*, 789 F.2d at 894-95.

For the above reasons, I respectfully dissent.

OCT 2 2 1993

(Date)

Ben L. Erdreich
Chairman